SUPREME COURT, U. S.

IN THE

FILED
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JOHN F. DAVIS, CLERK

# Supreme Court of the United States

October Term, 1969.

No. [redacted] 77

JAMES RUSSELL HASKIN,

*Petitioner,*

*vs.*

THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, REAL PARTY IN INTEREST,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI.

**To the Court of Appeal—State of California—Fourth Appellate District, Division Two.**

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# Supreme Court of the United States

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No. .....

JAMES RUSSELL HASKIN,

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THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, REAL PARTY IN INTEREST,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI.

**To the Court of Appeal—State of California—Fourth Appellate District, Division Two.**

James Russell Haskin, defendant in the Superior Court of the State of California, for the County of Orange, and respondent on an Order to Show Cause and Affidavit In re Contempt for failure to support, and petitioner in the Court of Appeal in the State of California, Fourth Appellate District, Division Two, for a writ to review his conviction of contempt, petitions for a Writ of Certiorari to review the latter Court's denial of a writ to annul the order of the said Superior Court finding Petitioner guilty of contempt and fixing the penalty at imprisonment.

## I.
## OPINION BELOW.

The order of the Superior Court of the State of California, for the County of Orange, is appended to this petition as Appendix A. There was no opinion by the Court of Appeal of the State of California, Fourth Appellate District, Division Two, nor in the Supreme Court of the State of California which refused to review. The orders of these courts are appended to this petition as Appendices B and C, respectively.

## II.
## JURISDICTION.

The order of the Supreme Court of the State of California was entered on December 24, 1968. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3) since the validity of the state statute on grounds of repugnancy to the Constitution of the United States is drawn in question.

## III.
## QUESTIONS PRESENTED.

1. Whether Section 1209.5 of the Code of Civil Procedure of the State of California is unconstitutional on its face in that it is violative of the privilege against self-incrimination of the Fifth Amendment to the United States Constitution as subsumed in the Fourteenth Amendment to the United States Constitution.

2. Whether Section 1209.5 of the Code of Civil Procedure of the State of California is unconstitutional on its face in that it is violative of Due Process of Law, as preserved by the Fourteenth Amendment to the United States Constitution, in that said Statute on its

face and as applied in the trial court, requires that the defendant in a quasi-criminal case affirmatively establish his innocence, and in that said statute permits conviction of the defendant by a standard of proof less than "beyond a reasonable doubt."

## IV.

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 1209.5.

"When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, *proof that such order was made,* filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced *and proof of non-compliance* therewith *shall be prima facie evidence of a contempt of court.*" (Emphasis added).

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## V.

## STATEMENT OF THE CASE.

On May 31, 1967, Patricia Noreen Haskin, as plaintiff, filed a divorce action against James Russell Haskin, as defendant, in the Superior Court of the State of California, for the County of Orange. On October 6, 1967, the said Superior Court made an order that commencing on that date defendant, petitioner herein, pay child support, alimony, reasonable medical, dental and optical services rendered to the minor children, and plaintiff's attorney's fees and costs.

On June 14, 1968, and again on August 28, 1968, plaintiff in the divorce action filed an Order to Show Cause and Affidavit In re Contempt, in each instance alleging that defendant failed to comply with the obligations of the order of October 6, 1967. A consolidated

hearing was held on both Orders to Show Cause on September 11, 1968, with the petitioner present and represented by counsel. At said hearing the trial court, relying on Section 1209.5 of the California Code of Civil Procedure stated that plaintiff need not put on a case thereby absolving plaintiff of any burden of proving defendant's ability to comply with the Order of October 6, 1967, and required the defendant "to go ahead with the burden of proof and establish his innocence" [R. 5, lines 17-18]. After the defendant under this compulsion of the court proceeded, the court held the defendant in contempt and sentenced him to four weekends in jail.

Petitioner then filed a Petition for Writ of Review with the Court of Appeal, State of California, Fourth Appellate District, Division Two, on October 3, 1968. Upon the denial of the Writ on November 26, 1968, petitioner filed a Petition for Hearing with the California Supreme Court. That Petition was denied December 24, 1968.

Petitioner raised the question of the constitutionality of Section 1209.5 of the California Code of Civil Procedure in timely manner in the California Court of Appeal. Raising of the constitutional issue in this manner meets the requirements of California law (*People v. Rodriguez* (1943), 58 Cal. App. 2d 415, 136 P. 2d 626; *People v. McCoughan* (1957), 49 Cal. 2d 409, 317 P. 2d 974).

## VI.

## REASONS FOR GRANTING WRIT.

**1. Section 1209.5 of the Code of Civil Procedure of the State of California Requires Petitioner to Testify Against Himself, Contrary to the Guarantees Against Self-Incrimination Contained in the Fifth Amendment to the Constitution as Subsumed in the Fourteenth Amendment, on Penalty of Being Adjudged Guilty of Contempt Without Further Testimony.**

The trial court in this case informed defendant at the outset that the affidavit filed by the plaintiff was sufficient and that defendant must "go ahead with the burden of proof and establish his innocence". The trial judge thus interpreted Section 1209.5 as requiring no affirmative testimony to show defendant's ability to comply with the court order allegedly offended.

The ruling of the court thus required the defendant to face a conviction of contempt upon no evidence, or at best upon a hearsay affidavit, or to give testimony against himself in the hope of establishing his innocence of the charge which was assumed to be true but not proved in any manner. Such a procedure is in violation of the provisions of the Fifth Amendment to the Constitution as subsumed in the Fourteenth Amendment prohibiting defendants to be coerced into testifying against themselves.

This court has held that the privilege against self-incrimination is applicable to the states by incorporation or absorption in the due process clause of the Fourteenth Amendment to the Constitution (*Malloy v. Hogan* (1964), 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 563).

The privilege against self-incrimination is applicable to cases involving contempt of court (*Gompers v. Buck's Stove and Range Co.* (1911), 221 U.S. 418, 444, 31 S. Ct. 492, 55 L. Ed. 797; see also *Ex Parte Gould* (1893), 99 Cal. 360). A conviction for a crime cannot stand when a state has failed to accord defendant federal constitutionally guaranteed rights and no state may formulate a law which violates such federally guaranteed rights (*Chapman v. State of California* (1966), 386 U.S. 18, 87 S. Ct. 785, 17 L. Ed. 2d 705).

The prosecution must establish guilt (including contempt of court) by evidence independently and freely secured and may not by coercion prove a charge against an accused out of his own mouth (*Malloy v. Hogan, supra*).

**2. A State Law Which Coerces a Defendant Into Testifying at a Contempt Hearing on Penalty of Otherwise Being Found Guilty of Contempt Based Solely on an Affidavit Filed by the Plaintiff Violates Defendant's Constitutional Protection Against Self-Incrimination and Violates Due Process of Law.**

Where the punishment for contempt involves a jail sentence it is clear that, if not precisely criminal in character, the contempt of court proceeding is at least quasi-criminal in nature. As such the defendant is presumed to be innocent, must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself (*Gompers v. Buck's Stove and Range Co., supra; Boyd v. United States* (1885), 116 U.S. 616, S. Ct. 524, 29 L. Ed. 746; see also *Bennett v. Superior Court* (1946), 73 Cal. App. 2d 203).

The privilege against self-incrimination cannot be limited to special classifications of people so as to deny it to some and extend it to others (*Spevack v. Kline* (1967), 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574). The Court has said that no person shall be compelled in any criminal case to be a witness against himself and no exception can be applied (*Slochower v. Board of Education* (1956), 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692; *Garrity v. State of New Jersey* (1967), 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562; and *Spevack v. Kline, supra*).

In *Garrity v. State of New Jersey, supra,* the court held that where the petitioner was given the choice of forfeiting a job or incriminating himself, the duress infected the entire proceeding and impinged on the constitutional rights of the defendant. In the instant case the defendant was told at the outset that short of testifying personally he would be found guilty of contempt based solely on the hearsay affidavit filed by the plaintiff.

The trial judge's order relieving the plaintiff, who stood in the position of the prosecutor in the contempt proceeding, from going forward with competent evidence, and which allowed plaintiff-prosecutor's case to be made entirely by hearsay, is based upon the language of Section 1209.5 and, therefore, on its face this section abridges the constitutional rights of the defendant and must be held unconstitutional.

### 3. Section 1209.5 of the Code of Civil Procedure on Its Face and as Applied Deprives Defendant of His Right to Be Warned of His Constitutional Right to Remain Silent.

It is fundamental that a defendant in a criminal or quasi-criminal proceeding cannot be compelled to waive a constitutional right without adequate warning of his rights (*Malloy v. Hogan, supra; Miranda v. State of Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694). Any waiver of the privilege against self-incrimination must be informed and intelligent (*Kilpatrick v. Superior Court* (1957), 153 Cal. App. 2d 146, 314 P. 2d 164). It has even been held in a contempt proceeding that filing a verified answer to an affidavit does not constitute a waiver of the privilege against self-incrimination in California (*Crittenden v. Superior Court of San Diego County* (1964), 225 Cal. App. 2d 101, 36 Cal. Rptr. 903).

In the instant case no warning of constitutional rights was given to the defendant before he was compelled to give testimony against himself [R. pp. 2-26]. Since Section 1209.5 on its face appears to require the defendant to rebut merely the affidavit filed by the plaintiff, and the court in this case so interpreted 1209.5 without giving adequate warning that defendant had the right to remain silent within the provisions of the Fifth Amendment, defendant was left only the choice between waiver of his privilege or certain conviction of contempt.

**4. Section 1209.5 on Its Face and as Applied Deprives Petitioner of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution in That It Permits Defendant to Be Found Guilty of Contempt Without Proof Beyond a Reasonable Doubt and Requires Petitioner Affirmatively to Prove His Innocence.**

Even in those situations in which courts have held that the burden of going forward with the evidence can be shifted to a defendant, the state must still provide sufficient evidence to justify shifting of burden without subjecting the accused to "hardship or oppression" (*Morrison v. People of the State of California* (1934), 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664). *Morrison,* however, requires that some evidence be presented by the prosecution before consideration can be given to the issue of whether this type of case permitts shifting of the burden. Under Section 1209.5 no evidence is required (at least as applied by the court in this case) other than the self-serving declaration of the plaintiff not subjected to cross-examination. In this case the affidavit did not contain adequate evidence of petitioner's ability to pay and was therefore insufficient on its face to establish contempt.

The Section as thus read and as thus applied denied the petitioner the protection of due process of law as guaranteed by the Fourteenth Amendment, which includes the presumption of innocence until proof of guilt has been adduced beyond a reasonable doubt (*Michaelson v. United States* (1924), 266 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162; *Gompers v. Buck's Stove and Range Co., supra; Bennett v. Superior Court. supra*).

**5. The Due Process Questions Presented Are Sufficiently Substantial to Warrant Review by the United States Supreme Court Even Though the Penalty Imposed May Be Considered Small.**

Although a fine may be small, certiorari will be granted where the due process questions presented are substantial (*Thompson v. City of Louisville* (1960), 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654). In the instant case, the trial court imposed a total sentence of eight days in jail. Any single deprivation of a moment of freedom constitutes a substantial question (*Thompson v. City of Louisville, supra*). In addition, there are involved in this case substantial questions as to statutory coercion denying petitioner his privilege against self-incrimination, the failure to warn petitioner of his right to remain silent, and the denial of petitioner's due process rights to be proven guilty beyond a reasonable doubt and to be presumed innocent until proven guilty. Unless stricken down by this court, state procedures similarly depriving defendants of rights could well mushroom.

## VII.
## CONCLUSION.

It is respectfully submitted that the Petition for Certiorari to the Court of Appeal-State of California-Fourth Appellate District, Division Two, should be granted.

Dated: Los Angeles, California on March 21, 1969.

SLAFF, MOSK & RUDMAN,
By EDWARD MOSK,
*Attorneys for the Petitioner.*

## APPENDIX A.

The Order of the Superior Court holding defendant in contempt is found on pages 41-45 of the Reporter's Transcript filed in connection with this proceeding; said pages are attached hereto as part of this Appendix "A".

Mr. Heil: I have about two questions of Mrs. Haskin. May I ask her sitting right here?

The Court: I don't think it's necessary.

Mr. Heil: Thank you, your Honor.

The Court: I'm going to discharge the contempt citation insofar as the alimony is concerned. I'm going to find the defendant guilty of contempt on the count listed in the Order to Show Cause for June 14, 1968, for his failure to pay attorney's fees, one count, in the sum of $425, and I make a finding that the defendant had knowledge of the obligation, he had knowledge of the court order and he had the funds to pay the court order and he deliberately failed to do it.

On the citation filed August 28th, 1968, I make a finding that the defendant is in contempt on his failure to make the payment of May 6, 1968, for $200; June 6, 1968, for $200; July 6, 1968, for $200; and I find that he had the knowledge of the court order and that he had the funds to make the payments.

Now, that's four counts. Mr. Haskin, you are subject to being sentenced to five days in the county jail on each count and a fine of $500, on each count or both. Before I pass the sentence are you presently employed?

The Defendant: Yes, I am.

The Court: Where?

The Defendant: The Loxley-Sherwood Corporation.

THE COURT: What hours do you work?

THE DEFENDANT: Approximately nine to five.

THE COURT: What days of the week?

THE DEFENDANT: Monday through Friday.

THE COURT: How much do you earn?

THE DEFENDANT: $600 a month.

THE COURT: Are there any liens or attachments against your salary?

THE DEFENDANT: Yes. There is a federal attachment against my salary.

THE COURT: Other than that?

THE DEFENDANT: That's all so far. They have not taken anything out, inasmuch as the corporation has lent me money before hiring me.

THE COURT: For the record, I am going to make one other finding to be included, that the defendant is delinquent in the sum of $1,300 child support, $425 attorney's fees with interest from October 6, 1967, and $7 alimony.

MR. HEIL: May I say something, your Honor?

THE COURT: Where do you live?

THE DEFENDANT: Hollywood.

Did you want an exact address? 3325 Barham Boulevard in Hollywood.

THE COURT: Do you have a car?

THE DEFENDANT: I own a car that doesn't run, your Honor. I am borrowing a car at the moment.

THE COURT: What were you going to say, Mr. Heil?

MR. HEIL: In this matter, your Honor, I was compelled to go to Los Angeles on a ridiculous deposition which took a day of my time. I had professional process servers that couldn't serve Mr. Haskin. I, myself,

had to do it. Since then, we have been here on four different occasions. I know the court has on one other occasion awarded me additional attorney's fees. I think it would be in order.

MR. DINSMOOR: I would submit the expenses are not the fault of the defendant.

THE COURT: I am going to sentence you to two days in county jail on each count, the time to be served on weekends from 8:00 p.m., Friday to 8:00 p.m. Sunday, starting with the weekend of Friday, the 13th of September, 1968, the 20th of September, the 27th of September and the 4th of October. You are ordered to report yourself into the Orange County Jail on or before 8:00 p.m., on Friday on each of those weekends, and they will have instructions to release you on Sunday at 8:00 p.m. Two days on each count.

I am going to order you to pay $350 additional attorney's fees to Mr. Heil, payable on or before November 25, 1968, in full.

How much costs have you had, Mr. Heil?

MR. HEIL: No costs, your Honor. The only way I could get it done was myself.

THE COURT: $350 attorney's fees payable on or before—What day did I say? November 30th?

THE CLERK: November 25th, your Honor.

THE COURT: November 25., 1968.

I want to tell you, Mr. Haskin, that if you don't like the court order the thing to do is to see your attorney and come in and get it changed, not to ignore it and not to rely upon your ex-wife as to any agreements that you may or may not have. The second thing is your primary legal, as well as your moral, duty, is to support your children. The creditors come second. Cred-

itors can't throw you in jail, but your wife can for failure to support your children, and if this court doesn't do it, she can go to the district attorney and they will do it. So that is your primary obligation. So in the future your jail sentence is primarily to remind you of that.

All other allegations or charges of contempt are dismissed.

MR. HEIL: May this be continued to a date certain, your Honor, to keep track of it?

THE COURT: No. I won't continue it. It's all over and done with. I have sentenced him to jail on four counts and discharged the rest of it. So if you want to start a new action, you'll have to bring in a new one.

MR. HEIL: How about payment of the child support, your Honor?

THE COURT: I haven't made any changes. The order is still in effect. I can't do anything on a contempt citation except—

MR. HEIL: I thought maybe to give him some time to purge himself of the other three days.

THE COURT: I'm just going to put him in jail. He knows if he misses again he will go back for sure. So we'll just leave it the way it is.

MR. HEIL: Thank you, your Honor.

(Adjourned.)

## APPENDIX B.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

James Russell Haskin, Petitioner vs. Superior Court, County of Orange, Respondent. 4 Civ. No. 9457. (Orange County # D-10097)

Filed, Nov. 26, 1968.

BY THE COURT:

Verified Petition for Writ of Review, filed as a Writ of Certiorari, is Denied.

Date November 26, 1968.

/s/ Kerrigan, acting *P.J.*

Copies to: Walter W. Heil, 874 North Tustin, Orange. Lippold, Henderson & Dinsmoor, 350 E. 17th St., Suite 111, Costa Mesa, Hon. Robert L. Corfman, Judge Superior Court, County of Orange.

## APPENDIX C.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Dec. 24, 1968.

Dear Sir: I have this day filed Order In re: 4 Civ. No. 9457 Haskin vs. Superior Court, Orange Co.

HEARING DENIED

Respectfully,

William I. Sullivan
*Clerk*

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JAMES RUSSELL HASKIN,

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*vs.*

THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, Real Party in Interest,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

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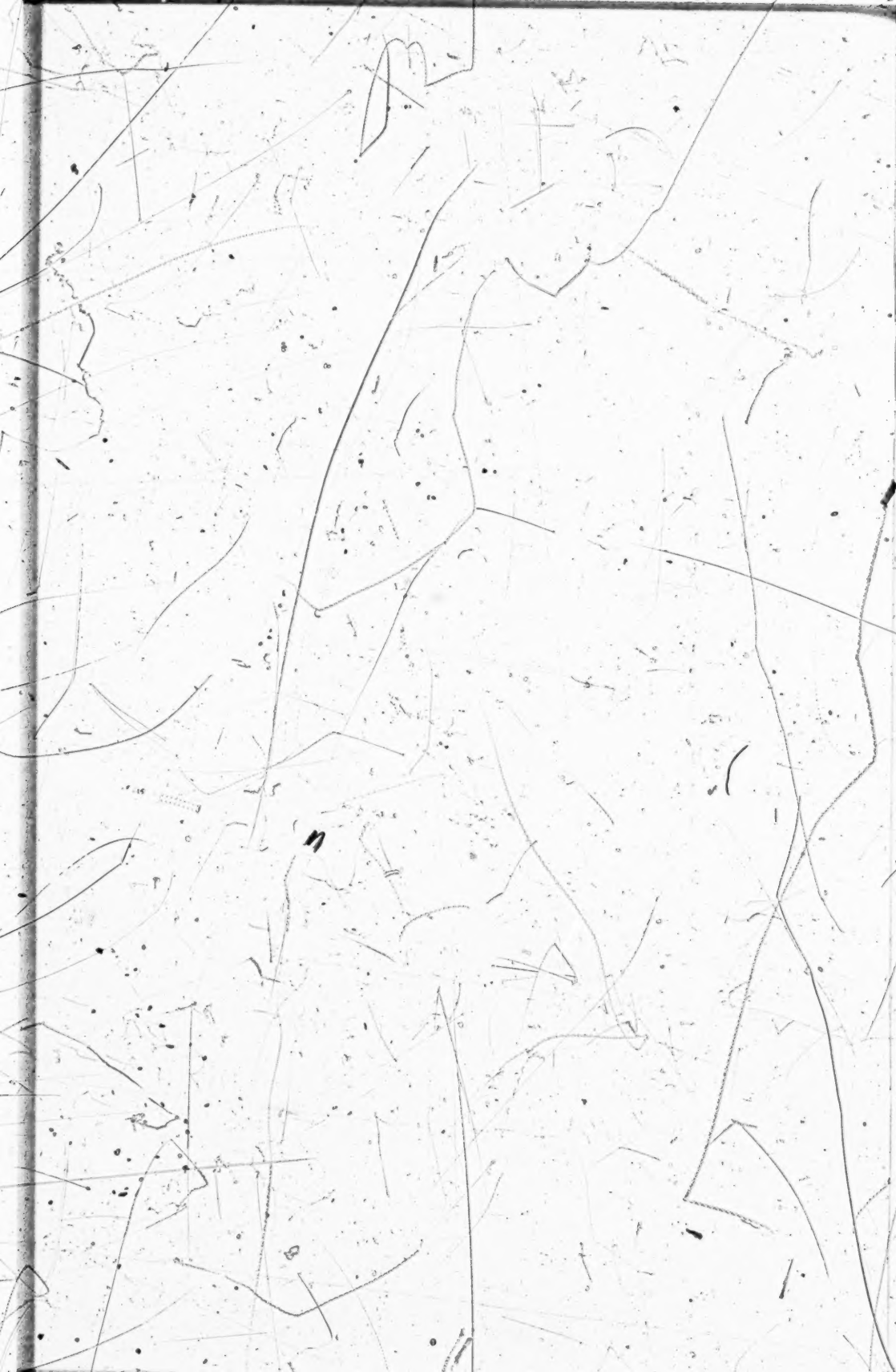

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IN THE

# Supreme Court of the United States

October Term, 1968
No. 1219

JAMES RUSSELL HASKIN,

*Petitioner,*

*vs.*

THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, Real Party in Interest,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

### Statement of the Case.

Respondent accepts Petitioner's statement of the facts which occurred *prior* to the contempt hearing on September 11, 1968.

At said hearing the Court stated: "The affidavit of the plaintiff seems to establish a *prima facie* case. It seems like the burden is on the defendant to justify his failure to make the payments. Do you want to go ahead?" [R. 2, lines 7-10.]

Counsel for Petitioner replied that he first desired to make some preliminary motions. He then moved to dismiss upon the basis that the amount of money in question was too small to warrant a contempt proceeding. The motion was denied. Counsel for Petitioner then stated: "Do I understand the court correctly that it

is the defendant's burden to move forward as far as the attorney's fees as well?" The court replied: "The affidavit appears to me to be sufficient to indicate that the defendant has sufficient income to have made the payments. So I feel that's enough to establish a *prima facie* case of contempt. It appears to me it would be for him to go ahead with the burden of proof and establish his innocence." [R. 4, lines 10-18.]

Counsel for Petitioner then called plaintiff as a witness under the applicable provision of the Evidence Code, and proceeded to examine her on the merits. [R. 5-26.] Counsel for Petitioner then called Petitioner as a witness. [R. 26-42.] After both parties had concluded, the court adjudged Petitioner guilty of contempt, finding that he had knowledge of the obligation and of the court order, and that he had the funds to pay said order and deliberately failed to do so. [R. 41, lines 10-13.]

Counsel for Petitioner did not at any time or in any manner raise before the trial court the issue of the constitutionality of Section 1209.5 of the Code of Civil Procedure.

Petitioner filed a Petition for Writ of Prohibition with the Court of Appeal, State of California, Fourth Appellate District, which was denied on September 18, 1968 without comment of court. This Petition had sought to prohibit enforcement of the contempt order and alleged, for the first time, the unconstitutionality of Code of Civil Procedure Section 1209.5.

On October 3, 1968, Petitioner filed a Petition for Writ of Review with said Court of Appeal on the grounds of unconstitutionality of the statute and ille-

gality of the contempt order. The Petition was denied without comment on November 26, 1968.

Petitioner then filed a petition for hearing with the California Supreme Court on three separate grounds: (1) constitutionality of said Section 1209.5; (2) insufficiency of information in plaintiff's affidavits establish a *prima facie* case of contempt, and (3) affidavits not properly admitted into evidence. The State Supreme Court denied the Petition without comment.

**The Federal Question Was Not Raised at the Trial Court Level, as Required by California Procedure.**

As set forth in the foregoing Statement of Facts, Petitioner made a motion in the trial court to dismiss, but upon other than constitutional grounds. At no time did Petitioner register any objection to the constitutionality of Code of Civil Procedure Section 1209.5 at the trial level.

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. [Citations] Noncompliance with such local law can thus be an adequate state ground for a decision below." *Edelman v. California* (1953), 73 S. Ct. 293, 295; 344 U.S. 357, 358-359.

It is a general rule of appellate review, early established and long adhered to in California, in both civil and criminal cases, that questions not raised in the trial court will not be considered on appeal. *Bank of America v. State Board of Equalization* (1962), 209 Cal. App. 2d 780, 798, 26 Cal. Rptr. 348, held that the fail-

ure to raise the constitutionality of a use tax statute in the trial court precluded appellate consideration of the matter, "under the familiar and well-established rule of appellate review that questions not raised in the trial court will not be considered on appeal." (*Apra v. Aureguy* (1961), 55 Cal. 2d 827, 831; 13 Cal. Rptr. 177; 361 P. 2d 897; *Dimmick v. Dimmick* (1962), 58 Cal. 2d 417, 422; 24 Cal. Rptr. 856; 374 P. 2d 824; *People v. Jordan* (1955), 45 Cal. 2d 697, 708; 290 P. 2d 484; *Damiani v. Albert* (1957), 48 Cal. 2d 15, 18; 306 P. 2d 780.)

An exception to the general rule has been recognized by the California courts in those infrequent cases where a fundamental error or gross irregularity has occurred. These exceptions have been limited to cases where there was a lack of jurisdiction in the trial court (*Johnson v. Banducci* (1963), 212 Cal. App. 2d 254, 259; 27 Cal. Rptr. 764), a complete failure to state a cause of action (*Galli v. Brown* (1952), 110 Cal. App. 2d 764, 779; 243 P. 2d 920), or when the error involved a grave matter of public policy (*People v. Rodriguez* (1943), 58 Cal. App. 2d 415, 421; 136 P. 2d 626.)

A contention on appeal that the lower court lacked jurisdiction due to an alleged invalidity of a statute has not been accepted by the California courts as an exception to the aforesaid general rule. For example, in *Metromedia, Inc. v. City of Pasadena* (1963), 216 Cal. App. 2d 270, 273; 30 Cal. Rptr. 731, appeal dismissed 84 S. Ct. 636; 376 U.S. 186, the appellate court held that where only one basis for holding an ordinance unconstitutional was urged during the trial, other constitutional considerations could not be properly urged on appeal. (*Rescue Army v. Municipal Court* (1946), 28

Cal. 2d 460, 465; 171 P. 2d 8; *Hershey v. Reclamation Dist. No. 108* (1927), 200 Cal. 550, 564; 254 Pac. 542.)

The statutory basis for the foregoing appellate rule in this State is found in Code of Civil Procedure Section 906, which provides in pertinent part,

> ". . . the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . ."

and in Penal Code Section 1259, which provides,

> "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. . . ."

Petitioner devotes but one brief paragraph to the point, flatly stating that the constitutional question was raised in a "timely manner in the California Court of Appeal," and citing two California cases in support thereof. The first case (*People v. Rodriguez, supra*) involved the receipt in evidence of a confession in which the prosecution had made abolutely no attempt to show voluntariness in spite of defendant's testimony as to the brutal means used to obtain the confession. The appellate court ruled that a miscarriage of justice had occurred and that it was "not willing to accept less

than an express waiver, at least one not arising from mistake and inadvertence" of defendant's constitutional rights in such regard. The court further stated that "The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved." [p. 421.] The other case cited by Petitioner (*People v. McCoughan* (1957), 49 Cal. 2d 409; 317 P. 2d 974), does not, as we read it, stand for the jurisdictional proposition urged by Petitioner, and the court certainly does not discuss the case in any such terms.

Respondent, therefore, submits that since the constitutionality of Section 1209.5 was not raised in the trial court it cannot be raised for the first time on appeal under California statutes and case law. The statute is a procedural one, which specifies what evidence constitutes a *prima facie* case of contempt in child support cases. Clearly, such a statute does not fall within any of the recognized exceptions to the well-established rule of appellate review which we urge herein.

**The State Supreme Court's Denial of Petitioner's Petition for Review Was Based on Adequate Nonfederal Grounds.**

The California Supreme Court denied, without comment, Petitioner's Petition for Review. As stated in *Stembridge v. State of Georgia* (1952), 72 S. Ct. 834, 837, 343 U.S. 541, 546:

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment."

There, as here, the failure of petitioner to raise the constitutional question in the trial court was involved, and

was held to be an adequate nonfederal ground upon which the action of the State Supreme Court might properly have been based. (*Bailey v. Anderson* (1945), 66 S. Ct. 66, 68; 326 U.S. 203-207; *Ellis v. Dixon* (1955), 75 S. Ct. 850, 854; 349 U.S. 458, 464.)

As stated in *Lynch v. New York* (1934), 55 S. Ct. 16, 17; 293 U.S. 52, 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must affirmatively appear from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

The burden is on the Petitioner to demonstrate that adequate state grounds cannot account for the decision below. (*Durley v. Mayo* (1956), 76 S. Ct. 806, 809; 351 U.S. 277, 281.)

**The Interpretation of Code of Civil Procedure Section 1209.5 by the California Courts Is Controlling.**

It is basic that, in the absence of very exceptional circumstances, the United States Supreme Court must accept as controlling the decisions of the state courts upon questions of local law, both statutory and common. (*American Railway Express Co. v. Kentucky* (1927), 47 S. Ct. 353, 354; 237 U.S. 269, 272; *International Union v. Wisconsin Employment Relations Board* (1949), 69 S. Ct. 516, 520; 336 U.S. 245, 251).

The courts of this State do not construe Code of Civil Procedure Section 1209.5 in the same manner as does Petitioner. *Oliver v. Superior Court* (1961), 197 Cal. App. 2d 237, 17 Cal. Rptr. 474, a case involving said statute, held that a hearing on an order to show cause in re contempt is in its nature a criminal proceeding. The court stated that:

> "Contemner stands in a position similar to that of a defendant in a criminal action and he may not be compelled to give testimony against himself. . . . (p. 240). The effect of this section is to place the burden of going forward upon the contemner. It does not shift the burden of proof to him. The latter burden remains with the party prosecuting the order to show cause. Therefore, the evidence introduced as opposed to the prima facie showing of contempt must leave the record in such condition that there remains substantial evidence to sustain the judgment." (p. 242.)

Although Petitioner attempts to distill from Section 1209.5 an interpretation which he states, in effect, forces the contemner to take the stand and thereby violates his constitutional rights against self-incrimination and his entitlement to due process of law, this is quite obviously incorrect. In fact, in the case at hand, Petitioner, by his counsel, prior to trial, took a fifty-one page deposition of plaintiff and, at the contempt hearing, called her to the witness stand as an adverse witness in accordance with well-established California procedure. He then assumed the stand of his own voli-

tion, upon request of his counsel, and without objection of any kind being registered.

There is nothing new or novel about a procedure which provides that, upon the establishment of certain evidentiary facts, a *prima facie* case is established. As stated in *Honeyman v. Hanan* (1937), 58 S. Ct. 273, 274; 302 U.S. 375, 378:

> "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

In fact, it would appear that procedures similar to that established in Section 1209.5 have been utilized in contempt hearings in the federal judicial system. *U.S. v. De Simone,* 267 F. 2d 741, certiorari denied 78 S. Ct. 116, 355 U.S. 867, involved a contempt procedure under the Federal Rules of Criminal Procedure. There, it was held that defendant's failure to appear on the return date in compliance with a Federal Grand Jury subpoena "was sufficient in itself to establish a prima facie case as to the requisite intent and wilfulness. 'The burden was then upon the appellant to show that he had in good faith tried to comply.'" The Circuit Court noted that in the contempt proceeding defendant "made no attempt to explain his failure to appear on the return date or his whereabouts from April 28th to May 19th. Under such circumstances the court had little choice but to find him guilty of criminal contempt." (p. 745.) [Cit. *U.S. v. Goldfarb,* 167 F. 2d 735.]

## Conclusion.

The issuance of a writ of certiorari being a matter of "sound discretion sparingly exercised" (Rule 30), it is respectfully submitted that the Petition for a Writ of Certiorari should not be granted in this case.

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